No. 80-667

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In the Supreme Court of the United States

OCTOBER TERM, 1980

SHELDON S. WITTENBERG AND GALLON, KALNIZ AND IORIO CO., L.P.A.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend (Pet. 4-7) that the court of appeals erred in holding that an order disqualifying them from representing multiple clients before a grand jury is not appealable under 28 U.S.C. 1291.

1. On July 12, 1979, a federal grand jury sitting in the Northern District of Ohio began investigating a riot and suspected arson that occurred at the Plaza Hotel Renovation Project in Toledo on July 3, 1979. During the course of its investigation, the grand jury subpoenaed approximately 22 witnesses. Petitioner Wittenberg represented two individual targets of the grand jury's investigation—Mr. and Mrs. Jeffrey Chambers—as well as a number of non-target witnesses. In addition, petitioner Wittenberg and his law firm (petitioner Gallon, Kalniz & Iorio Co., L.P.A.)

represented several labor unions that were also targets of the investigation (Pet. App. A2, A18).

Mr. and Mrs. Chambers appeared before the grand jury in July 1979 and were advised of their target status. They both declined to testify, invoking the Fifth Amendment privilege against compulsory self-incrimination. Two of the non-target witnesses represented by Wittenberg testified and answered most of the questions put to them; approximately half of the other non-target witnesses represented by Wittenberg were subpoenaed merely to produce documents (Pet. App. A2).

In October 1979, the government filed a motion requesting that Wittenberg and his law firm be barred from representing multiple witnesses before the grand jury in this investigation. Following a hearing, the court granted the government's motion, finding that petitioner's representation of both target and non-target clients constituted an actual conflict of interest that endangered the interests of petitioners' clients as well as the grand jury's investigation. The court accordingly ordered Wittenberg and his law firm to cease representing more than one individual witness or one target organization (Pet. App. A1-A17).

Petitioners—but not their clients—appealed the disqualification order pursuant to 28 U.S.C. 1291. The court of appeals dismissed the appeal, holding that the witnesses could seek review of a disqualification order only by refusing to testify on the ground that they were deprived of counsel of their choice, and seeking review of a contempt citation for refusing to testify. The court further observed (Pet. App. A19):

> The lawyers for the witnesses, as independent litigants, have asserted no cognizable federal question—no federal constitutional, statutory or common law claim—and hence we lack jurisdiction over the appeal brought in

the name of the lawyers. Indeed the lawyers did not file a complaint on their own behalf in the court below, or assert as parties claims independent of their clients.

2. As an initial matter, we do not believe that petitioners are proper parties to challenge the district court's disqualification order. Petitioners' clients did not choose to appeal the disqualification order, and we have been informed that, since the district court entered its order, petitioners' former clients have retained new counsel and have complied with the grand jury's subpoenas requiring their testimony or the production of documents. If the clients had discharged petitioners wholly of their own volition, petitioners would be required to abide by that decision[1] and would not be entitled to seek a court order reinstating them to their position as counsel for the witnesses. A court could not, in this fashion, force an attorney on a client who did not wish to have him. Cf. *Faretta* v. *California*, 422 U.S. 806, 820-821 (1975).[2]

Similarly, we believe that a client is sufficiently the master of his own case and his relationship with his attorney (see ABA Code of Professional Responsibility DR 2-110(B)(4); DR 7-101) that he may choose to acquiesce in or decline to seek appellate review of a judicial order requiring disqualification of his attorney, even though his attorney might wish to challenge that order. In such a situation, we do not believe the attorney properly may countermand his client's wishes and invoke the judicial process in an effort to restore an attorney-client relationship that his client, for whatever reason, does not wish to maintain. But see *In re Investiga-*

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[1]Cf. Dr 2-110(B)(4) of the ABA Code of Professional Responsibility, which requires an attorney to withdraw from employment (with permission of the court if its rules so require) where he is discharged by his client.

[2]An attorney who has been discharged by his client might seek damages from the client for breach of contract, but that would be far less intrusive than an order requiring reinstatement as counsel.

tion Before April 1975 Grand Jury, 531 F. 2d 600, 606 n.10 (D.C. Cir. 1976). Thus, in the present case, it is the clients, not their attorneys (petitioners), who were the proper parties to appeal the district court's order disqualifying petitioners. Only if the clients appeal can the appellate court be assured that a decision is sought at the behest of those whom ethical rules are designed to protect, and not on the basis of an interest of the attorney that perhaps diverges from that of a client.[3]

3. Quite aside from the standing issue, there is a serious question whether the order granting disqualification was appealable in the circumstances of this case. The issue whether an order *denying* a disqualification motion is

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[3]This case does not involve a claim that the district court's disqualification order in effect found petitioners guilty of an ethical impropriety such that an appeal might be thought necessary to vindicate their independent interest in their professional reputations. Cf. ABA Code of Professional Responsibility, DR 4-101(C)(4). To the contrary, the district court emphasized that its finding that a potential conflict had ripened into an actual conflict was "not intended to impugn or castigate [petitioners'] activities thus far. The government has made no showing that either Mr. Wittenberg or his firm have acted in fact improperly to derogate the interests of one or more clients in favor of other clients" (Pet. App. A6 n.2). However, even where a disqualification order indicates that the attorney has engaged in unethical conduct, it is not clear that an independent right of appeal by the attorney should be recognized. The attorney might have an adequate remedy in any disciplinary proceedings that are brought.

Petitioners' only reference to interests of their own that may be distinct from those of their clients is a single passing reference to "the professional rights of the attorneys to represent their clients" (Pet. 10). But, as we have explained, an attorney has no such right vis-a-vis a client who no longer wishes to have the attorney represent him. A client's decision not to appeal a disqualification order necessarily involves such a determination by the client. Thus, any claim of interference with petitioners' practice of their profession has now become moot. In any event, petitioners did not rely in the court of appeals on their professional rights as a basis for this appeal (Pet. App. A19, quoted *supra*), and this Court therefore should not consider that issue here. *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977).

appealable under 28 U.S.C. 1291 has divided the circuits and is now before the Court in *In re Multi-Piece Rim Products Liability Litigation, Firestone Tire & Rubber Co.* v. *Risjord*, No. 79-1420 (argued Nov. 12, 1980). However, even the courts of appeals that have held orders denying disqualification not to be immediately appealable have held that orders *granting* disqualification are appealable, at least where those orders arise in the trial context. See, *e.g.*, *Armstrong* v. *McAlpin*, 625 F. 2d 433, 440-441 (2d Cir. 1980) (en banc), petition for cert. pending, No. 80-431 (filed Sept. 18, 1980); *In re Multi-Piece Rim Products Liability Litigation, Firestone Tire & Rubber Co.* v. *Risjord*, 612 F. 2d 377, 378 (8th Cir. 1980) (en banc), cert. granted, No. 79-1420 (May 12, 1980); cf. *In re Continental Investment Corp.*, No. 80-1362 (lst Cir. Oct. 31, 1980), slip op. 12; *Melamed* v. *ITT Continental Baking Co.*, 592 F. 2d 290, 295 (6th Cir. 1979); *Community Broadcasting of Boston, Inc.* v. *FCC*, 546 F. 2d 1022, 1028 n.41 (D.C. Cir. 1976).

Even assuming that these cases are correct and that orders granting disqualification motions ordinarily may be appealed under the "collateral order" doctrine—an issue the resolution of which will no doubt be informed by this Court's decision in the *Firestone* case—there is a substantial argument that a different rule should be applied in the grand jury setting. This Court's decisions in *United States* v. *Ryan*, 402 U.S. 530 (1971), and *Cobbledick* v. *United States*, 309 U.S. 323 (1940), emphasize the important public interest in preventing the interruption of grand jury proceedings that would result from immediate review of orders issued in that setting. Thus, where an order to produce documents is concerned, review is conditioned upon the witness's refusing to comply with the order and being cited for contempt. The First Circuit, in *In re Benjamin*, 582 F. 2d 121 (1978), has applied this same rule to an order disqualifying a witness's counsel, reasoning that "only the imminence of punishment of a non-complying witness sets a matter sufficiently apart and

is of sufficient moment to justify the interruption in proceedings occasioned by immediate review." *Id.* at 122. The Sixth Circuit applied the same reasoning in the instant case, relying on its prior decision in *In re April 1977 Grand Jury Subpoenas*, 584 F. 2d 1366 (1978). That the Sixth Circuit views the appealability question differently in the grand jury setting is evidenced by its decision in *General Electric Co.* v. *Valeron Corp.*, 608 F. 2d 265, 266-267 (1979), in which it held that an order granting disqualification in a civil case is immediately appealable under 28 U.S.C. 1291.[4]

Other courts of appeals, however, have entertained appeals from orders disqualifying counsel in grand jury proceedings. See *In re Investigation Before the February, 1977, Lynchburg Grand Jury*, 563 F. 2d 652, 655 (4th Cir. 1977); *In the Matter of the Grand Jury Empaneled January 21, 1975*, 536 F. 2d 1009, 1011 & n.1 (3d Cir. 1976); *In re Investigation Before April 1975 Grand Jury*, 531 F. 2d 600, 605 n.8 (D.C. Cir. 1976). It may be that at some future date the disagreement among the circuits on this point will have to be resolved by this Court. The present case is not an appropriate vehicle in which to address this question, however, because petitioners are not proper parties to prosecute an appeal of the order requiring their disqualification.[5]

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[4]Outside of the grand jury context, the First Circuit also has held that orders disqualifying counsel are appealable. See *In re Continental Investment Corp.*, No. 80-1362 (Oct. 31, 1980), slip op. 12.

[5]Petitioners also request (Pet. 7-10) the Court to determine whether the district court abused its discretion in precluding them from representing more than one witness, claiming a conflict among the circuits as to the propriety of joint representation of witnesses appearing before a federal grand jury. We agree with petitioners that the courts of appeals in recent years have announced somewhat divergent views on the authority of district judges to disqualify counsel in grand jury proceedings because of a conflict of interest. However, this is not an appropriate case for review of the matter, because the court below has not ruled on the propriety of the district court's disqualification order. Thus, if the

It is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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Court were to determine that petitioners could appeal the disqualification order, it should remand the case to the court of appeals for consideration of petitioners' substantive claims.